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Supreme Court, U.S.
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MAR 3 1986
JOSEPH F. SPANIOL, JR.
CLERK

85-889

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

THE STATE OF COLORADO

Petitioner,

v.

STEVEN LEE BERTINE,

Respondent.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Steven Lee Bertine, Respondent herein, respectfully moves the Court for leave to proceed herein in forma pauperis, in accordance with the provisions of Title 28, United States Code, Section 1915, and Rule 46 of this Court, and to file herein his Brief in Opposition to the Petition for Writ of Certiorari previously filed by the State of Colorado. The Brief in Opposition to the Petition for Writ of Certiorari is presented herewith for filing.

The Affidavit of Respondent in support of this motion is filed herewith.

Dated: February 28, 1986

Respectfully submitted,

DAVID F. VELA
Colorado State Public Defender

Thomas M. Van Cleave III

THOMAS M. VAN CLEAVE, III
Deputy State Public Defender
(A Member of the Bar of this Court)

COUNSEL FOR RESPONDENT
1362 Lincoln Street
Denver, Colorado 80203
(303) 866-2661

No. 85-889

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

AFFIDAVIT IN SUPPORT OF MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

THE STATE OF COLORADO, Petitioner

v.

STEVEN LEE BERTINE, Respondent

I, Steven Lee Bertine, being duly sworn, depose and say that I am the Respondent in the above-entitled case; that in support of my motion to proceed on appeal without being required to prepay fees, costs, or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the appeal are true.

1. I am presently on bond and living in Boulder County, Colorado; and I am not employed.

2. I have but a mininal amount of cash and no checking or savings account.

3. I do not own any real estate, stocks, bonds, notes, automobiles or other valuable property.

4. I have been adjudicated as indigent throughout the proceedings in the State of Colorado and have been represented by the Colorado State Public Defender at all stages of these proceedings.

I understand that a false statement or answer to any question in this affidavit will subject me to penalties for perjury.

Steven L Bertine
STEVEN LEE BERTINE

Subscribed and sworn to before me this 17th day of December, 198__.

My Commission Expires: My Commission Expires Sept 9, 1988

Notary Public

United Bank of Boulder
P.O. Box 299
Boulder, Colo. 80306

CERTIFICATE OF SERVICE

I, Thomas M. Van Cleave, III, a member of the Bar of the Supreme Court of the United States and counsel of record for Steven Lee Bertine, Respondent herein, certify that on February 28, 1986, I served one copy of the attached Motion to Proceed in Forma Pauperis, and Affidavit in support thereof, on the Honorable Alexander M. Hunter, District Attorney for the Twentieth Judicial District, State of Colorado, counsel for Petitioner, by depositing same in the United States Mails, postage prepaid, addressed as follows:

Alexander M. Hunter
District Attorney of Boulder County
P. O. Box 471
1777 Sixth Street
Boulder, Colorado 80306

Thomas M Van Cleave III

No. 85-889

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1985

THE STATE OF COLORADO,

Petitioner,

v.

STEVEN LEE BERTINE,

Respondent.

On Writ of Certiorari to

the Supreme Court of Colorado

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

DAVID F. VELA
Colorado State Public Defender

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QUESTION PRESENTED FOR REVIEW

Should certiorari be granted to review the decision of the Colorado Supreme Court which upheld the trial court's suppression of evidence obtained as the result of a search by police of closed containers in the Respondent's vehicle conducted in the process of impounding the vehicle after arresting him on a traffic charge?

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No. 85-889

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1985

THE STATE OF COLORADO,

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STEVEN LEE BERTINE,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE FACTS

Respondent generally accepts the factual statement in the Petition for Writ of Certiorari, but reserves the right to make corrections or additions where necessary or appropriate.

ARGUMENT

THE DECISION OF THE COLORADO SUPREME COURT UPHOLDING THE TRIAL COURT'S SUPPRESSION OF EVIDENCE WAS SUBSTANTIALLY CORRECT, AND THE GRANTING OF THE PETITION FOR WRIT OF CERTIORARI WOULD BE INAPPROPRIATE IN THIS CASE.

A. Inapplicability of South Dakota v. Opperman and Illinois v. Lafayette.

In South Dakota v. Opperman, 428 U.S. 364 (1976), this Court held that an inventory search of an automobile impounded for municipal ordinance violations was reasonable under the Fourth Amendment. The reasonableness of the search was determined by balancing the car owner's right to privacy against the governmental interests of protecting the car owner's property while in police custody, protection of the police against claims or disputes over lost or stolen property and protection of the police from potentially dangerous instrumentalities in the car. In determining that the governmental interests prevailed over the privacy interests, the Court initially noted that an automobile's inherent mobility and the fact that it is primarily used for public travel cause the owner's expectation of privacy in it to be diminished. Since the owner of the car was not present to make other arrangements for the safekeeping of his valuables, which were visible from outside the car, his privacy interests in the car were outweighed by the governmental interest of protecting his property, and the inventory search was reasonable.

The present case is factually distinguishable from Opperman because the factors in support of the governmental interests which render an inventory search reasonable are not present here. Unlike Opperman, the Respondent was present at the time his vehicle was impounded and was thus available to make arrangements for its safekeeping. The offense for which he was arrested, driving under the influence of alcohol, was one which, in all likelihood, would not entail a lengthy

jail stay; in fact, he was released on bond the afternoon following his arrest. And, finally, the impound lot was secured by a six-foot high fence with a locked gate to which only the tow-truck driver had access and was frequently patrolled. (Compare the impound facility in Opperman: An old county highway yard fenced partially with a wooden fence and the rest with a dilapidated wire fence. Id., 428 U.S. at 3095 n. 1.) In short, the facts in the present case fail to establish the necessity for conducting an inventory search that was present in Opperman. See also, Cady v. Dombrowski, 413 U.S. 433 (1973) (inventory search upheld where owner of car was unavailable, police had reason to believe that a gun was left in the car, and the car was towed to an unsecured lot with no guard posted over it).

The governmental interest of protecting the police from false claims and dangerous instrumentalities would not have been furthered by the inventory search of the Respondent's vehicle. There is no indication that there would be any less likelihood of a claim for missing property if the vehicle was not searched prior to impoundment, and any danger to police could have been eliminated by not searching the vehicle. Opperman, 428 U.S. at 379 (Powell, J., concurring). Thus, there was an insufficient basis under Opperman to justify an inventory search of Respondent's vehicle.

In addition to the absence of factual support for any governmental interests in searching Respondent's car for inventory purposes, the fact that the search exceeded the scope of an inventory search also rendered it illegal. Officer Reichenbach, in searching the Respondent's vehicle, not only inventoried the items in plain view, he also searched a closed backpack, a closed nylon bag inside the backpack and closed tin cans inside the nylon bag. The State contends that the case of Illinois v. Lafayette, 462 U.S. 640 (1983), extends the scope of an automobile inventory search to closed containers. However, the unique facts of that case do not support an extension of its holding to an automobile search.

Lafayette involved the search of the contents of a shoulder bag belonging to an arrestee as he was being booked into jail. Utilizing the same governmental interests set forth in Opperman, this Court determined that they outweighed the privacy interests of the arrestee and thus the search of the shoulder bag was reasonable. In such a situation the distinct possibility of the introduction of contraband or dangerous instrumentalities into a jail facility satisfies the governmental interest of protecting the police from the danger posed by such items, and creates a substantial if not compelling necessity to search personal belongings of persons booked into the jail. At the same time, incarceration divests a person of all but the most personal privacy rights. Thus, the overwhelming imbalance of the governmental interests over the privacy interests in personal property in a preincarceration inventory search as presented in Lafayette is vastly different from the comparable interests involved in an automobile inventory search.

B. Requirement of Prior Determination of Probable Cause.

In Opperman this Court held that in determining the validity of an inventory search of an automobile, the general reasonableness requirement of the Fourth Amendment is applicable to automobile inventory searches without reference to the warrant or probable cause requirements. Opperman, 428 U.S. at 369-70. Since such searches are "conducted in accordance with established police department rules of policy" the protection of the warrant requirements are deemed unnecessary. Opperman, 428 U.S. at 383 (Powell, J., concurring).

While Opperman approved automobile inventory searches in general, it did not authorize the inspection of the contents of closed or sealed containers in the course of such searches. Id., 428 U.S. at 388 n. 6 (Marshall, J., dissenting). In dealing with searches of closed containers located in automobiles, the more traditional warrant and or probable cause requirements have been applied. Thus, in

United States v. Chadwick 433 U.S. 1 (1977), the Court, noting that "a person's expectations of privacy in personal luggage are substantially greater than in an automobile" held that a warrant was required to search a footlocker contained in an automobile. Id., 433 U.S. at 13. See also, Arkansas v. Sanders, 442 U.S. 753 (1979) (warrantless search of luggage found in trunk of taxi in which defendant was riding at time of his arrest was improper).

Even where exceptions to the warrant requirement have allowed warrantless searches of closed containers found in automobiles, a preliminary showing of probable cause has still been required. New York v. Belton, 453 U.S. 454 (1981) (search incident to a lawful custodial arrest of the occupant of an automobile may extend to the contents of any containers found within the passenger compartment of the car); United States v. Ross, 456 U.S. 798 (1982) (probable cause to search an automobile allows search of any containers found therein). The recent cases of this Court involving searches of containers in automobiles thus indicate that containers found in an automobile may be searched only upon a prior determination of probable cause, either as to the container itself or as to the automobile within which it is located; and unless a recognized exception to the warrant requirement exists, either for searching the container or the car, a warrant must be obtained to search the container.

Thus, while a reasonable automobile inventory search pursuant to established procedures is permissible, the search of any closed containers found therein must be based upon a prior determination of probable cause, and, absent a recognized exception to the warrant requirement, only upon issuance of a warrant.

C. Overbroad Discretion Allowed by Inventory Search Procedures.

As noted above, only the general reasonableness standard, and not the probable cause or warrant requirements, are applicable in determining the validity of an inventory search of an automobile. Under Opperman this lesser standard is

justified because the policies served by the requirements of the Warrant Clause of the Fourth Amendment are effectuated by the inherent limitations governing an inventory search:

> Inventory searches, however, are not conducted in order to discover evidence of crime. The officer does not make a discretionary determination to search based on a judgment that certain conditions are present. Inventory searches are conducted in accordance with established police department rules or policy and occur whenever an automobile is seized. Thus, there are no special facts for a neutral magistate to evaluate.

Opperman, 428 U.S. at 383 (Powell, J., concurring). However, in the present case, the inventory search procedures under which the inventory search of Respondent's car was conducted provided no real limit to the officer's discretion in determining whether to impound the vehicle as well as the extent of the inventory search of it.

In Procedure No. 77-GP-0-19 (See Appendix A), w[illegible] was admitted into evidence at the suppression hearing, and which was in effect at the time of the inventory search of Respondent's vehicle, the procedures for automobile inventory searches provided for situations where a vehicle or its contents have been used in the commission of a crime differ from those where the vehicle has not been so used. Where the vehicle has been used in the commission of a crime, the officer is required to conduct a detailed vehicle inspection and inventory and remove personal items of value and place them in "Property" for safekeeping. The officer is then required to request a tow truck for transportation of the vehicle to the impoundment facility. On the other hand, where the vehicle and its contents are not used in the commission of a crime the officer may invoke "Park and Lock Procedures," in which the vehicle may be parked and locked instead of impounded. In this situation the officer again conducts a detailed vehicle inspection and inventory. However, Procedure III.B.2. provides that "[c]losed containers that give no indication of containing either valuables or a weapon may not be opened and the contents searched. (i.e., inventoried)." And Procedure III.B.4. requires the officer to drive the vehicle off the roadway and park it in the nearest public parking area.

At the suppression hearing Officer Reichenbach testified that since the Respondent was arrested for a traffic offense he considered the vehicle to have been used in the commission of a crime. However, Reichman admitted that he did not always impound vehicles involved in traffic offenses and that a driving-under-the-influence violation was no different from any other custodial traffic arrest. He further testified that whether a vehicle was impounded under Part II of the Procedure or just "Parked and Locked" under Part III was in the discretion of the individual officer at the scene.

Under the police department procedures for impounding and or searching vehicles involved in a custodial traffic violation situation, the applicable inventory procedures in this case thus allow the officer at the scene wide latitude in determining when and how the arrestee's vehicle is to be inventoried. The officer is initially given discretion whether the vehicle is to be handled under Part II or Part III of the inventory procedures. In the situation of a traffic offense, the officer may or may not, in his discretion, treat the vehicle as having been used in the commission of a crime. If he does treat the vehicle as having been used in the commission of a crime, he is required to conduct an inventory search and have the vehicle towed to the impound lot. If he does not so treat the vehicle, he has additional options. He may still have the vehicle impounded, in which case he may conduct a full inventory search of the vehicle. Or he may utilize the "Park and Lock" procedures under which he is required to drive the vehicle to the nearest public parking area (which, in this case, was less than a block away) and is precluded from searching any closed containers that give no indication of containing valuables or weapons (which in this case they did not). In view of the wide discretion allowed officers in the determination of when and how a vehicle whose driver has been arrested for a traffic offense may be impounded and searched, the inventory procedures pursuant to which Respondents car was searched

fail to sufficiently limit the discretion of the officer in conducting an inventory search so as to provide an adequate substitute for the traditional probable cause and warrant requirements. Accordingly, the validity of the inventory search of Respondent's vehicle must be determined under the principles established for those requirements.

CONCLUSION

Under the unique facts of this case, it cannot be said that the decision of the Colorado Supreme Court invalidating the search of closed containers during the inventory search of Respondent's vehicle presents such a substantial conflict with decisional law of this Court as to warrant the granting of the State's Petition for Writ of Certiorari.

DAVID F. VELA
Colorado State Public Defender

Thomas M. Van Cleave III

THOMAS M. VAN CLEAVE, III
Deputy State Public Defender
(A Member of the Bar of this Court)

COUNSEL FOR RESPONDENT
1362 Lincoln Street
Denver, Colorado 80203
866-2661

CERTIFICATE OF MAILING

I, Thomas M. Van Cleave, III, a member of the Bar of the Supreme Court of the United States and counsel of record for Steven Lee Bertine, Respondent herein, certify that on February 28, 1986, I deposited in the United States Mails, postage prepaid, and properly addressed to the Clerk of the Supreme Court of the United States, the foregoing Brief in Opposition to Petition for Writ of Certiorari and Motion for Leave to Proceed in Forma Pauperis.

Thomas M Van Cleave III

THOMAS M. VAN CLEAVE, III

CERTIFICATE OF SERVICE

I, Thomas M. Van Cleave, III, a member of the Bar of the Supreme Court of the United States and counsel of record for Steven Lee Bertine, Respondent herein, certify that on February 28, 1986, I served one copy of the attached Brief in Opposition to Petition for Writ of Certiorari on the Honorable Alexander M. Hunter, District Attorney for the Twentieth Judicial District, State of Colorado, counsel for Petitioner, by depositing same in the United States Mails, postage prepaid, addressed as follows:

The Honorable Alexander M. Hunter
District Attorney of Boulder County
P. O. Box 471
1777 Sixth Street
Boulder, Colorado 80306

Thomas M Van Cleave III

APPENDIX A

BOULDER POLICE DEPARTMENT - BOULDER, COLORADO
OFFICE OF THE CHIEF OF POLICE
GENERAL PROCEDURE

DATE ISSUED 7/19/77 PROCEDURE NO. 77-GP-O-19

DATE EFFECTIVE 9/01/77 EXPIRATION Indefinite

CANCELLED PROCEDURE None

SUBJECT OF PROCEDURE MOTOR VEHICLE IMPOUNDS

TO: All Department Personnel

I. Purpose

To insure the appropriate care and security of motor vehicles taken into custody by the Department.

II. Procedures

A. Upon placing a motor vehicle in Police custody, Officers shall take the following steps in securing the vehicle and its contents:

1. If the vehicle or its contents have been used in the commission of a crime, or are themselves the fruit of a crime, the Officer shall conduct a detailed vehicle inspection and inventory and record it upon the VEHICLE IMPOUND FORM.

2. Personal items of value should be removed from the vehicle and subsequently placed into Property for safekeeping.

3. The Officer shall request a Tow Truck, and upon its arrival have the Tow Truck operator sign the IMPOUND FORM, keeping one copy in his possession, before the Officer releases the vehicle for impoundment in the City of Boulder impoundment facility.

B. The above procedure shall be followed when a vehicle involved in a traffic accident is to be held for evidentiary purposes.

III. Park and Lock Procedures

A. Upon placing the operator of a motor vehicle in custody, Officers may take the following steps in securing the arrestee's vehicle and property IF THE FOLLOWING CONDITIONS ARE PRESENT:

1. The vehicle and/or its contents ARE NOT themselves the fruit of a crime, nor has the vehicle or its contents been used in the commission of a crime.

2. The vehicle has not been involved in a traffic accident requiring its impoundment as evidence.

3. Vehicles should only be parked and locked with approval of the arrestee.

B. If the above conditions exist, the Officer may take the following steps to secure the vehicle:

1. Conduct a detailed vehicle inspection and inventory and record it upon a VEHICLE IMPOUND FORM. When possible, have a second Officer witness this inventory.

2. Closed containers that give no indication of containing either valuables or a weapon may not be opened and the contents searched. (i.e., inventoried)

3. Personal items of value will be removed from the vehicle and subsequently placed into PROPERTY for safekeeping.

4. The Officer shall drive the vehicle off the roadway and legally park the vehicle in the nearest PUBLIC parking area. The date, time, and location where the vehicle is parked shall be indicated on the IMPOUND FORM.

5. The Officer shall remove the ignition keys, and lock all doors of the vehicle.

6. During the booking process, the arrestee shall be given a continuation form for his signature which indicates the location of his vehicle. One copy of the continuation form is to be retained in the case file.

7. The arrestee shall be advised of the procedures required in obtaining personal property removed from the vehicle and placed into Property for safekeeping, i.e., TV's, valuables, etc.

8. The ignition key to the vehicle should remain with the items that are transported with the arrestee should this individual be incarcerated.

NOTE: Routine Motor Vehicle Impoundment Procedures should be used if no public parking areas exist in the immediate vicinity of the arrest, or there is reasonable risk of damage or vandalism to the vehicle, or the arrested individual requests that the vehicle be impounded in the City's storage facility.

C. If the aforementioned conditions exist the officer may, at his discretion, release the vehicle to a present individual designated by the arrestee after ownership is shown to be held by this individual, and the person so indicated shows proof of holding a valid motor vehicle operators license.